# Supreme Court of the United States.

*October Term, 1898*

| | |
|---|---|
| THOMAS COSGROVE, *Appellant,* vs. EUGENE D. WINNEY, United States Marshal for the Eastern District of Michigan. | File No. 16,675. No. 172. |

## *BRIEF FOR APPELLANT.*

I.

This is an appeal on the part of petitioner in *habeas corpus*, from the final decision of the District Court for the Eastern District of Michigan, denying the prayer of petitioner, and remanding him to the custody of the Marshal to await trial in that court.

It appears that on or about October 25th, 1895, the schooner "Aurora," a Canadian boat, while unloading her cargo in Detroit, was libeled for debt by Port Huron parties. Thomas Cosgrove, the appellant, of Sarnia, Ontario, was her captain. The libel was not served on him, and he contends that it was in nowise brought to his attention. A day or two later, having finished unloading

the cargo, he procured his clearance papers and departed with his vessel for Sarnia. On Nov. 7th, 1895, Eugene D. Winney, the appellee, who was then the Marshal for this district, and who had served the libel, lodged in the police court for Detroit, which is within said district, a complaint for larceny of the boat. A warrant (Rec., p. 4,) issued thereon, and Cosgrove was taken into custody pursuant thereto, in Sarnia, and extradition proceedings were instituted under the treaty between the United States and Great Britain, as supplemented and proclaimed March 25, 1890. The hearing was continued from time to time, beginning Feb. 29, 1896, by Judge McKenzie, who, on April 15, 1896, decided there was ground for Cosgrove's extradition under the treaty, on the charge of larceny of the vessel. (Rec., p. 2.) On May 9, 1896, President Cleveland made a requisition on the Canadian government, (Rec., p. 3,) which that government honored and issued the surrendering warrant (Rec., p. 3) upon which Cosgrove was brought to Michigan under the treaty for trial on the charge of larceny. He was delivered to the police department of Detroit, and was brought into the police court the latter part of May, 1896 (Rec., p. 9) on the surrendering warrant and the warrant of Nov. 7, 1895. He was arraigned in the police court and pleaded not guilty, June 6, 1896, and was there examined on the extradition charge of larceny, June 12, 1896, and was by the court bound over for trial in the Recorder's Court for Detroit, (the court of competent jurisdiction to determine the case,) at the July term, 1896, on the larceny charge. (Rec., p. 2.) The procedure in that court is by information. An information charging Cosgrove with the larceny offense upon which he had been surrendered under the extradition proceedings was duly filed, the case was placed upon the docket of that court for the July term, 1896, and was kept upon that docket, and the docket of every succeeding term of

that court, and the trial thereof urged by Cosgrove to the time of his arrest on the capias issued from the District Court, and to the time of suing out the *habeas corpus*. (Rec., p. 2.) The Recorder's Court kept the case pending and on the docket, but refused to place him on trial. He furnished bail in that court.

In December, 1895, the grand jury in the District Court for the Eastern District of Michigan—Southern Division—indicted appellant Cosgrove on the charge of resisting the Marshal in the service of a writ of attachment (Rec., pp. 5, 6, 8, 9,) and the charge of unlawfully removing a vessel from the custody of the Marshal, (Rec., pp. 8, 9,) offenses growing out of the same *act* as the larceny charge. A capias issued on the indictment in the same month on a charge of obstructing the U. S. Marshal in the execution of a writ of attachment, (Rec., p. 5,) a non-extraditable offense. The capias was not served until Dec. 14, 1896, and while appellant was on bail within the district awaiting his trial on the extradition charge of larceny in the Recorder's Court. He could not furnish bail in the District Court, and was held by the Marshal in the county jail. The District Court arraigned him. He interposed a plea to the jurisdiction of the court to hold him for trial, or try him, and asserted that his arrest on the capias was illegal, in that he was not subject to arrest or triable on the District Court charge until a reasonable time after his trial on or discharge from the charge of larceny, for which he had been surrendered to the State Court under the extradition proceedings. The witnesses are substantially the same in both cases. But the penalty in the U. S. Court case is double that of the State Court, to which he was delivered on the charge of larceny.

Continually from Cosgrove's arrest on the capias, the marshall held him thereon imprisoned in the county jail and prevented his trial in the recorder's court. In the

latter part of Feb., 1897, the district court sought to try him upon the charges set forth in the indictment on which the capias issued and he had been arrested and was held for trial in that court. A few days later, viz: on March 3, 1896, he petitioned the district court for a writ of *habeas corpus* (Rec., p. 1) which was issued. (Rec., p. 5.) The matter was argued and submitted. The court denied the prayer for release from imprisonment and remanded Cosgrove to the custody of the marshal to await trial in that court. (Rec. p. 7.) From this order an appeal was at once taken to the Circuit Court of Appeals for the Sixth Circuit. The result of that appeal is shown in the following letter:

"*United States Circuit Court of Appeals for the Sixth Circuit, Judge's Chambers, Cincinnati,*

July 6th, 1897.

The Hon. H. H. Swan,
Judge U. S. Court,
Detroit, Mich.

My Dear Judge:—

We heard to-day the appeal in the case of Thos. Cosgrove, appellant, against the United States. Upon a suggestion of the District Attorney, after the case had been fully argued on its merits, we were obliged to find that the case involved only the construction of a treaty, and therefore under section 5 of the Court of Appeals Act, the Circuit Court of Appeals had no jurisdiction of the appeal and we were obliged to dismiss the appeal. We were convinced, however, that is, the members of the court, Judge Lurton, Judge Clark and myself, that there was grave reason to doubt the correctness of your conclusion in the case, and it was suggested that another writ of *habeas corpus* might be taken out before one of the members of the court sitting in the Circuit Court. It has occurred to me, however,

that the shortest way is to suggest to you from your colleagues of the circuit bench that you release Cosgrove on his own recognizance under the writ of *habeas corpus*, and that you allow an appeal directly to the Supreme Court. As we have dismissed the appeal in this court the case is pending in the District Court, and you would have power, I doubt not, to make any order of release and fix any bond. I have delivered this letter into the hands of Mr. Sellers, counsel for Cosgrove, and he will present it to you. I write this letter with the concurrence of the other members of the court.

Very sincerely yours,
WILLIAM H. TAFT."

The appeal to this court was allowed July 7, 1897. (Rec., p. 10.) Cosgrove's own recognizance was then taken under the writ of *habeas corpus*, as suggested in the letter from the Circuit Court of Appeals. (Rec., p. 11.) The Recorder's Court case was still pending and undetermined.

Appellant contends that the tenth article of the treaty under which he was extradited on the charge of larceny, the Acts of Congress passed to carry that and similar treaties into effect, the decisions of the court, notably the Federal Supreme Court in the case of Rauscher, the British "Extradition Acts," the requisition and the surrendering warrant, gave him, on his delivery to the state authorities, immunity from arrest on the charge of any other offense, for a reasonable time after his acquittal of the charge; or, if not tried thereon, for a reasonable time after being set at liberty, to return unmolested to Canada. Appellee contends that a release on bail affords the opportunity contemplated by the treaty and renders the accused liable to arrest and trial in the District Court.

This position the appellant denies and says that bail does not affect the operation of the extradition treaty.

Cosgrove asks a reversal of the decision of the District Court and for his discharge from the custody of the marshal and District Court. (Rec., pp. 10 and 11.)

## II.

Appellant relies on assignments 1 to 6, (Rec., pp. 10 and 11), both inclusive.

The real error complained of in the appeal consists in the District Court's holding that Cosgrove, extradited from Canada to the Recorder's Court of Detroit, and remaining on bail awaiting his trial in that court on the extradition charge of larceny, was liable to arrest on the District Court capias and trial on the charges or either of them therein and in the indictment named; and further, that the District Court erred in not discharging Cosgrove from the custody of the marshal and in remanding him to the custody of the marshal and District Court.

## III.

This appeal draws in question the construction of the treaty made under the authority of the United States in 1889, (C. C. A., letter *supra*,) and must be direct from the District Court to the Supreme Court.

*C. C. A., Letter Supra.*
*26 U. S. Stat., at L., Pages 827, 828, Sec. 5.*

The appellant was in custody of the marshal in violation of a treaty of the United States, and a writ of

*habeas corpus* was the proper remedy to secure his release (Rev. Stat., U. S., Sec. 753.) The District Court had power to issue the writ for the purpose of an inquiry into the cause of the restraint of appellant's liberty (U. S., Rev. Stat., Secs. 751, 752,) and the writ was properly directed to the marshal (the appellee) in whose custody the appellant was detained (Rec., p. 6, U. S. Rev. Stat., Sec. 755).

*Habeas Corpus* is the appropriate remedy to obtain discharge from imprisonment under an order or a process of a court, which it was without jurisdiction to make or issue.

*Ex Parte McKnight, 48 Ohio St., 588, 605.*

*Ex Parte Terry, 128 U. S., 304, 305, and cases.*

*Sternaman vs. Peck, 80 Fed. Rep., 883, 884.*

*People ex rel., Tweed vs. Liscomb, 60 N. Y., 591.*

*In re Reinitz, 39 Fed. Rep., 205*

*People vs. Stout, 30 N. Y. Supp., 902, 903.*

And where, as in the present case, personal liberty of the appellant is concerned, the judgment of the District Court is not conclusive. The question of the court's authority to hold him for trial may be reviewed by this court on *habeas corpus.*

*Ex Parte Siebold, 100 U. S., 371.*

While a United States court has power to release on *habeas corpus* a party restrained of his liberty in violation of the constitution, laws and treaties of the United States, under state process on an indictment for an offense against the laws of a state (Ex parte Royall, 117 U. S., 241; In re

Reinitz, 39 Fed. Rep., 205) a state court has no jurisdiction to issue a writ of *habeas corpus*, or to continue the proceedings under the writ when issued, for the discharge of a person held under the authority, or claim and color of authority, of the United States, by an officer of that government. (Tarble's Case, 13 Wall., 397.) It follows that by the act of the District Court, taking and holding Cosgrove in the custody of the marshal on the capias, it forestalled his trial in the Recorder's Court to which he had been extradited.

*Tarble's Case, Supra.*
*U. S. vs. Booth, 21 How., 506.*
*Black's Const. Law, p. 143.*
*Baker's Annotated Const. of U. S., p. 60.*

Were it larceny of the vessel, the offense upon which Cosgrove was extradited to the State Court, that the District Court sought to try him upon and arrested him on the capias for the purpose of that trial, the District Court would have no jurisdiction; for the record shows clearly that the warrant issued from the State Court, and he was taken into custody pursuant thereto before the complaint or proceeding was entered in the District Court, and that the State Court case was followed and complete jurisdiction for trial therein effected by delivering him to the State Court under the extradition proceedings, long before he was seized on the capias from the District Court. The State Court had acquired jurisdiction over the person of the accused and the subject matter, and was entitled to retain that jurisdiction unmolested by the District Court. It was said by Mr. Justice Swayne in Taylor vs. Taintor, 16 Wall., 370, that "where a State Court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction in-

voked is exhausted; and this rule applies alike to both civil and criminal cases." And it was likewise said by Mr. Justice Field in Rio Grande Railroad Co. vs. Gomila, 132 U. S., 485, "where a State and a Federal court have concurrent jurisdiction over the same subject matter, that court which first obtains jurisdiction will retain it to the end of the controversy, either to the exclusion of the other, or to its exclusion, so far as to render the latter's decision subordinate to the other; a doctrine which, with some exceptions, is recognized both in Federal and State Courts. Wallace vs. McConnell, 13 Pet., 136, 143; Taylor vs. Taintor, 16 Wall., 366, 370." Also, U. S. vs. Van Fossen, 1 Dillon, 411.

But it is not upon the charge of larceny that the District Court seeks to try Cosgrove. It is upon much more serious charges—resisting the marshal in the service of the attachment (Rec., pp. 5 and 6,) and running away with the vessel (Rec., pp. 8 and 9.)

The marshal (appellee) is the party who set the machinery of both courts in motion. The State Court acquired the jurisdiction and must retain it, under the laws and treaty provisions governing Cosgrove's surrender to that court. The marshal cannot turn aside from the State Court to the District Court for the trial of the accused. In the language of Judge Campbell, we say, "Can a person who has been demanded for prosecution as a criminal, and who could not have been demanded on any other ground, be arrested after arriving here on a different complaint, and have his original accusation dropped, by the same prosecuting authority? If the requisition had been made for an expressly fraudulent purpose, with no expectation of prosecution for the crime which was its pretext, *we do not think any department of the government could sanction such a use without the plainest perversion of justice. No ingenious reasoning could remove from*

*such a transaction the disgrace which no decent commonwealth could afford to incur.*" Frank Cannon's Case, 47 Mich., 486.

"The privilege of the accused remains, though the indictment and record be unassailable." (*ex parte*, McKnight, 48 Ohio St., 604). The question in the appeal under consideration is not whether Cosgrove committed a crime, but whether he is lawfully held in custody by the marshal and the district court.

*Brown on Jurisdiction, Sec. 98.*

Assignments three and four will be considered and treated together.

In the light of the present treaty between the United States and Great Britain, the legislative acts, the decisions of the courts, the requisition and the surrendering warrant, it would seem idle to contend that had Cosgrove remained in jail continually from the time he reached the state court on the extradition warrant, to the time he was arrested on the capias issued from the district court, he would be subject to such arrest and triable on the district court charges while the extradition charge was still pending against him in the state court. No claim is made that he was not extradited under the treaty, with all the rights and immunities accorded by that treaty to an extradited person charged with an offense therein named. Neither is it claimed that the offense charged against him in the district court capias is an extraditable offense. The controversy really is whether Cosgrove being on bail pending the trial of his case in the recorder's court on the charge upon which he had been surrendered for trial in that court, lost his treaty protection by so being on bail and thereby rendered himself subject to arrest on the capias and triable in the District Court for offenses other

than the offense upon which he was surrendered, and alleged to have been committed prior to his extradition. If being bailed cost him his treaty immunity, it would seem to follow that in extradition cases, to preserve inviolate the treaty protection from subsequent arrest pending his trial on the extradition charge, the accused must forego bail and remain constantly within the prison walls. In other words, under appellee's counsel's construction of the treaty and laws governing Cosgrove's surrender, the right to bail afforded by the federal and state constitutions is, in otherwise bailable cases, withheld from such extradited person, if he would continue under the treaty protection. For if on bail, after a few days elapse, the extradited person would be to the same extent, subject to arrest on another charge, if he remain within the country to which he was extradited, as if he had returned from the country of his asylum. The treaty says the person shall have an opportunity of returning to the country of his asylum. If he does not avail himself of such opportunity, he is at once thereafter subject to arrest in the same degree as if he had gone back to the country of his asylum and then reappeared in the country to which he was extradited.

The treaty of 1842 enumerated seven distinct offenses as extraditable. It did not include larceny. Larceny was added in the supplemental treaty proclaimed March 25, 1890. This treaty does not contain the offense named in the capias issued on the District Court indictment. Section three of the tenth article of this treaty, called the Treaty of 1889, is as follows:

"*No person surrendered by or to either of the high contracting parties shall be triable or be tried for any crime or offense. committed prior to his extradition, other than the offense for which he was surrendered, until he*

*shall have had an opportunity of returning to the country from which he was surrendered.*"

*26 U. S. Stat., at L., pp. 1508, 1509.*

This action expressly limits the surrender to one offense and the trial of the accused on that offense and no other, until he shall have had an opportunity of returning to the country of his asylum on regaining his liberty. The treaty of 1842, did not in express terms contain this limitation.

But this court, several of the Federal Circuit and District Courts, and some of the State Courts, declared such to be the meaning of the tenth article of that treaty.

*U. S. vs. Rauscher, 119 U. S., 407.*
*Com. vs. Hawes, 13 Bush., (Ky.) 697.*
*State vs. Vanderpool, 39 Ohio St, 273.*
*Blandford vs. State, 10 Tex. App., 627.*
*U. S. vs. Watts, 14 Fed. Rep., 130.*
*Ex parte, Hibbs, 26 Fed. Rep., 431.*
*Ex parte, Coy, 32 Fed. Rep., 917.*
*In re. Reinitz, 39 Fed. Rep., 204.*

These and other cases have established the rule that when the rights and immunities of the person surrendered to the United States under the treaty are invaded by seeking to hold and try him on a charge other than the one upon which he was surrendered under the treaty, it is within the domain of the courts to interfere in his behalf on his application and restore him to his treaty protection. It is true that the cases of U. S. *vs.* Caldwell, 8 Blatchford, 131; U. S. *vs.* Lawrence, 13 Blatchford, 295; and Adriance *vs.* Lagrave, 59 N. Y., 110, hold that such interference is not a matter for the judicial but is for the executive department of government.

The Caldwell and the Lawrence cases were decided by

the same judge, and the Lagrave case was by a divided court. The case of Rauscher and other cases clearly present the rule that, under the Federal Constitution, a treaty is a law of the land, and when its meaning is in clear terms expressed, the courts refer to it and carry out its provisions as they would an act of congress. Chief Justice Marshall said: "Our constitution declares a treaty to be the law of the land. It is consequently to be regarded in the courts of justice as equivalent to an act of the legislature whenever it operates of itself, without the aid of any legislative provision."

*Foster vs. Neilson, 2 Peters, 253.*

The treaty is the supreme law of the land, and of it the court was required to take judicial notice.

*U. S. Const., Art. 6, Sec. 2.*
*U. S. vs. Rauscher, 119 U. S., 419.*
*People vs. Stout, 30 N. Y. Supp., 900.*

In a well considered case under the treaty of 1842, in 1878, Chief Justice Lindsay, speaking for the court, said: "It would scarcely be regarded an abuse of the rules of construction from these manifest restrictions, unaided by extraneous considerations, to deduce the conclusion that it was not contemplated by the contracting parties that an extradited prisoner should, under any circumstances, be compelled to defend himself against a charge other than the one upon which he is surrendered, much less against one for which his extradition could not be demanded."

*Commonwealth vs. Hawes, 13 Bush, 705.*

The act of the British parliament, passed in 1843 for the purpose of carrying the treaty into effect, provided that such persons that should thereafter be extradited to the United States should be delivered "to such person or

persons as shall be authorized in the name of the United States to receive the person so committed, and to convey him to the United States, to be tried for the crime of which such person shall be accused."

*Com. vs. Hawes, Supra, 707.*

Then the court, referring to section 5272 of the U. S. Rev. Stat., passed in 1848, say: "This, like the act of Parliament, declares the purpose of the surrender to be, that the alleged offender may '*be tried for the crime of which such person shall be accused.*' "

*Id., 708.*

"While legislative interpretation of statutes is not conclusive upon the courts, yet in the case of a treaty which is in its nature a contract between nations, enactments like these by the high contracting parties are of persuasive power in the construction of the treaty."

*State vs. Vanderpool, 39 Ohio St., 279.*

"The maxim *expressio unius est exclusio alterius* may, with propriety, be applied to each of these acts; and read in the light that maxim they are persuasive, at least, of the construction which, up to 1848, the two contracting parties had placed on the 10th article of the treaty.

"The doctrine has long prevailed with us that a foreign government has no right to demand the surrender of a violator of its laws, unless we are under obligations to make the surrender in obedience to the stipulations of an existing treaty."

*Lawrence's Wheaton on International Law, 233, and authorities cited.*

"*The right of one government to demand and receive from another the custody of an offender* who has sought

asylum upon its soil depends upon the existence of treaty stipulations between them, and in all cases *is derived from and is measured and restricted by the provisions, express and implied, of the treaty.*"

*Com. vs. Hawes, Supra, 708, 709.*

Also *State vs. Vanderpool, Supra.*

On the authority of numerous European writers, Mr. William Beach Lawrence said: "All the right which a power asking an extradition can possibly derive from the surrender must be what is expressed in the treaty, and that all rules of interpretation require the treaty to be strictly construed; and, consequently, where the treaty prescribes the offenses for which extradition can be made and the particular testimony to be required, the sufficiency of which must be certified to the executive authority of the extraditing country, *the state receiving the fugitive has no jurisdiction whatever over him, except for the specified crime to which the testimony applies.*"

*14 Albany Law Journal, 96.*

"The Lord Chancellor of England gave it as his opinion, in a speech in the *Winslow case*, in the House of Lords, that the authorities sustained the principle that, 'apart altogether from the wording of treaties, there is a silent and implied condition in extradition that the crime for which the surrender of a man is asked must be specified, and that it is for that crime alone that he must be tried.' This statement is supported by numerous European authorities. The Lord Chancellor quotes from the circular of the French Minister of Justice, issued April 15, 1841, as follows: 'The extradition declares the offense which leads to it, and this offense alone ought to be inquired into. So that if during the prosecution for the crime which has led to the extradition, there should arise the evidence of

a new crime, *a new demand of extradition ought to be made.*' See, the Foreign Relations of the United States for 1876, pp. 286-296."

*6 Crim. L. Mag., 516.*

See also,

*Field's International Code, Sec. 273.*
*Wells on Jurisdiction of Courts, Sec. 322, p. 336.*
*Spear on Extradition, (2nd Ed.), Ch. 6, p. 70.*

Dr. Wharton says: "The proper object of extradition is to secure the presence of a fugitive in the demanding state for the purpose of trying him for a specified crime. The process is not to be used for the purpose of subjecting him collaterally to criminal prosecutions other than that specified in the demand. Provisions guaranteeing to the fugitive the right to leave the demanding country after his trial for the offense for which he is surrendered, *in case of acquittal, or in case of conviction, after his endurance of punishment*, are incorporated in many treaties. When not, they should be made subject of executive pledge. *It is an abuse of this high process, and an infringement of those rights of asylum which the law of nations rightly sanctions, to permit the charge of an offense for which extradition lies to be used to cover an offense for which extradition does not lie, or which it is not considered politic to invoke.*"

*Wharton, Confl. R., (2nd Ed.,) Sec. 846, p. 744.*

"The rule as stated by the German author, Heffter, is that, 'The individual whose extradition has been granted cannot be prosecuted or tried for any crime except that for which the extradition has been obtained. To act in

any other way, and to cause him to be tried for other crimes or misdemeanors, would be to *violate the mutual principle of asylum and the silent clause contained by implication in every extradition.*'

"President Tyler expressed the opinion that the treaty of 1842 could not be used to secure the trial and punishment of persons charged with treason, libels, desertion from military service and other offenses * * *

"This construction of the tenth article of the treaty is * * * essential to render it absolutely certain that the treaty cannot be converted into an instrument by which to *obtain the custody and secure the punishment of political offenders.*"

*Com. vs. Hawes, 13 Bush, 712, 713.*

The British government, unlike our own in this respect, regards a treaty as an international compact, not a legislative act, and a violation of a treaty provision in favor of the accused, a matter for consideration by the executive department of that government. The British Parliament has likewise legislated upon the subject of surrender of persons accused of crime under treaty. "The Extradition Act, 1870," provides as follows: "A fugitive criminal shall not be surrendered to a foreign state, unless provision is made by the law of that state, or by arrangement, that the fugitive criminal shall not, until he has been restored or had opportunity of returning to Her Majesty's dominions, be detained or tried in that foreign state for any offense committed prior to his surrender other than the *extradition crime proved by the facts on which the surrender is grounded.*"

*33 and 34 Vict., Ch. 52, Sec. 8, Subd. 2.*

In an extradition case arising under the treaty with Mexico, the court said: "Why stipulate in solemn com-

pact that the government upon whom the demand is made shall have the right to examine into the charge, and, if a *prima facie* case is not shown, to refuse to surrender, if after being extradited the party extradited can be forced to answer to a *charge neither named in the treaty nor examined by the authorities of the government making the surrender?* In exact and unequivocal language the treaty sets out the precise purpose for which the fugitive is to be surrendered, and negatives by implication as strong and conclusive as a direct and positive negation that the person surrendered may be tried for offense different from that for which he was extradited under the stipulations of the contract made between the high contracting parties."

*Blandford vs. State, 10 Tex. App., 638.*

"*All civilized nations agree* on one point, and that is, *that they will not deliver a fugitive to be tried for political offenses*, and through great caution, with a view to prevent this, the sixth article of the above treaty provides, among other things, that 'the provisions of the present treaty shall not be applied in any manner to any crime or offense of a purely political character.' What supreme nonsense is this, if the fugitive can be extradited for one crime and then placed on trial for another—make a *prima facie* case of murder, extradite, and then try him for rebellion! Our conclusion is, that *the party extradited must be tried, if tried at all, alone upon the charge upon which he was extradited.*"

*Id., 639.*

In another case, under the treaty of 1842, the court says: "An extradited person cannot lawfully be detained or tried on any charge other than the one on which he was surrendered by the extraditing government. * * * * For the latter government to detain such person for trial

on any other charge would be not only an *infraction of the contract* between the parties to the treaty, but also a *violation of the supreme law of this land* in a matter directly involving his personal rights. *Field, Extra., 107.* A right of person or property, secured or recognized by treaty, may be set up as a defense to a prosecution in disregard of either, with the same force and effect as if such right was secured by an act of congress." *Ex parte Hibbs, 26 Fed. Rep.. 431.*

"Where a person whose extradition has been granted for trial for a particular crime named in the extradition warrant, the demanding government obtains no lawful right to try him for any other offenses, without *bad faith to the government that consented to his extradition, and for which it would have just grounds to demand reparation.* Such an act would be a violation of both the letter and spirit of the treaty." *Ker vs. People, 110 Ill., 641, 642.*

Again, reference is made to the Ohio case, under the treaty of 1842, wherein the court said, the treaty "limits the duty of surrender to those cases specified in the treaty, in which the evidence of guilt is sufficient, according to the laws of the nation where the fugitive or person charged is found, to justify his committal for trial, if the act charged had been committed there. The right of the nation where the fugitive is found to first hear and determine the case, and to decide upon the evidence whether according to its own laws the *crime charged* has been committed, *i. e.* whether a *case for committal has been made out, secures to the government upon which the demand has been made the right to determine for itself whether the demand shall be complied with. This necessarily excludes the idea that the demanding government can decide for itself to try the prisoner, after obtaining custody, for other crimes;* other-

wise the purpose of the treaty is defeated. If the demanding government can so decide, the whole intention of the treaty could be defeated, and *the right of asylum*, which has been *the boast of both governments*, would depend entirely upon the action of the demanding government.

"To extradite under the treaty for an offense named therein, and then to retain the prisoner for a non-extraditable offense, or for a different one, though extraditable, upon which no hearing had been had as provided in the treaty, would be not only a *breach of good faith* by the demanding government, but a *violation of the right of asylum* in favor of the accused, guaranteed to him by the treaty. The *sole object of the treaty* was to enable each government *to protect* its citizens and inhabitants *in the right of asylum*, except they come within the provisions named. The legislation of both governments clearly supports this construction."

*State vs. Vanderpool, 39 Ohio St., 278, 279.*

The case of Watts was decided by Judge Hoffman of the District Court of California. (14 Fed. Rep., 130.) Watts was indicted for crimes arising under the U. S. and fled to England. He was extradited and brought back. It was claimed in his behalf that he could only be tried for the crime for which he had been extradited. And the court there held that an *extradited fugitive could not*, under the treaty of 1842, between the United States and Great Britain, *be held to answer for an offense for which his surrender could not have been asked and would not have been granted.* This question afterwards came up before the Supreme Court of the United States in the case of Rauscher. Rauscher had been indicted upon a charge of murder committed upon the high seas within

the admiralty and maritime jurisdiction of the United States. He fled to England, and was extradited and brought from there to New York. Subsequently and while he was awaiting trial on this charge, he was indicted and an attempt made to subject him to trial on the charge of beating and wounding a sailor on board a ship. The question in that case arose whether or not he could be tried upon the charge of beating and wounding a sailor on board a ship. it being *admitted that the same witnesses and substantially the same testimony, delivered in the case of beating and wounding, would have been delivered in the case of murder.* The Federal Supreme Court, in line with the case of Watts and other cases, in the opinion written by Mr. Justice Miller, *held that the person extradited could only be tried for the crime for which he was extradited* unless, after having been tried for such crime, a sufficient period had elapsed after having been released for him to return to the country of his asylum.

In decidlng the case the court said: "Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the state which makes the surrender of the fugitive, and that that fugitive passess into the hands of the country which charges him with the offense, free from all positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before, he is under the protection of a government which has afforded him an asylum from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure."

*U. S. vs. Rauscher, 119 U. S., 421.*

"As this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, *It is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition.*"

*Id., 422.*

And in the Rauscher case it is said that, Sec. 5272, Rev. Stat. U. S., provides for the surrender by the United States to a foreign goveanment of a person there charged with crime "*to be tried for the crime of which such person shall be so accused.*"

Section 5275 of the Revised Statutes of the United States, quoted by the court, declares:—"Whenever any person is delivered by any foreign government to an agent of the United States, for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the President shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence, until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

And the court then say:

"The obvious meaning of these two statutes, which

have reference to all treaties of extradition made by the United States, is that the *party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings;* and that, *when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought.* This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration, and, whether it is or not, *it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.* That right, as we understand it, is that *he shall be tried only for the offense with which he is charged in the extradition proceedings, and for which he was delivered up;* and that, *if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.*"

*U. S. vs. Rauscher, 119 U. S., 423, 424.*

In that opinion the court reviewed the cases of *U. S. vs. Caldwell, 8 Blatchford, 131; Com. vs. Hawes, 13 Bush, 697; Blandford vs. State. 10 Tex. App., 627; State vs. Vanderpool, 39 Ohio St., 273,* and other cases, and then said:

"Upon a review of these decisions of the Federal and State Courts, to which may be added the opinions of the distinguished writers, which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition, that a person who has been brought within the jurisdiction of the court by virtue of proceedings

under an extradition treaty, can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, *until a reasonable time and opportunity have been given him, after his release or trial upon such a charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.*"

*U. S. vs. Rauscher, 119 U. S., 429, 430.*
*Also, People vs. Stout, 30 N. Y., Supp., 898, Nov. '94.*

This court, in the opinion, also written by Mr Justice Miller, in *Ker vs. Illinois*, 119 U. S., 443, said: "In the case of *U. S. vs. Rauscher*, just decided, *ante*, 407, and considered with this, the effect of extradition proceedings under a treaty was very fully considered, and it was there held, that, when a party was duly surrendered, by proper proceedings, under the treaty of 1842 with Great Britain, he came to this country clothed with the protection which the nature of such proceedings and the true construction of the treaty gave him. One of the rights with which he was thus clothed, both *in regard to himself and in good faith to the country which had sent him here*, was, that *he should be tried for no other offense than the one for which he was delivered under the extradition proceedings.*"

"A treaty may be the foundation of a private right, and then it becomes the subject of judicial action, as does any other private right. This subject has been well considered in the case of the *United States vs. Rauscher*, who was returned from Great Britian to this country, in pursuance of a demand of the President, on the charge of murder. He was tried, and a verdict of guilty rendered by the jury on the charge of inflicting cruel and unusual punishment upon one of the seamen of the vessel on which

he was an officer. He denied the authority of the court to try him for this, or for any other offense, except that for which he had been surrendered in the extradition proceedings. The Supreme Court, in response to questions certified to it by the Judges of the Circuit Court, held that *his contention was sound*, and that the treaty would, in the event that he was *either acquitted or not tried for the offense for which he had been extradited, give him a right to be set at liberty and allow him a reasonable time to return to Great Britain.* The court, referring to the Head Money Cases, quoted from its language in that case in reference to the character of a treaty as a law of the land."

*Miller on the U. S. Constitution, pp. 322, 323.*

The general term of the Supreme Court of N. Y., in a case arising under the present treaty, said: "By virtue of the supreme law of the land, the custody of the relator was so qualified as not to exist other than for the purpose of his *trial upon that specific charge.* For any other purpose his person was beyond the legitimate control of the court, excluded from it by force of the international treaty."

*People vs. Stout, supra, 902.*

See also, *Rauscher case, supra, p. 432.*

"It is settled by the judgment of the Supreme Court in the case of *U. S. vs. Rauscher*, 119 U. S., 407, 7 Sup. Ct., 234, as well as by the provisions of Section 5275, of the Revised Statutes of the United States, that, under the treaty with Mexico, the petitioner is exempt from trial for any other offense than that specified in the warrant of extradition until he has had a reasonable time to depart out of the United States."

*In re Rowe, 77 Fed. Rep., p. 165, (C. C. A., Oct. 26, 1896).*

And the Court of Appeals of N. Y., per O'Brien, J., said :

"Whether fugitives from justice extradited from foreign countries for offenses against the United States or any of the states could be brought within the proper jurisdiction for any offense except that charged in the papers upon which the accused was surrendered by the foreign government was, until quite recently, a question that produced much conflict of judicial authority. The Supreme Court of the United States has settled the question, so far as concerns the obligation due to foreign nations, or to persons surrendered by them, upon the demand of the Federal Government pursuant to treaty obligations. (*U. S. vs. Rauscher, 119 U. S., 407.*)

"In that case it appeared that Rauscher was surrendered by the Government of Great Britain to the United States upon its demand, for murder committed upon the high seas, an offense of which its courts had jurisdiction, and that he was subsequently tried and convicted of another and minor offense, namely, the cruel and inhuman punishment of the same seaman, and thus the *act* for which he was extradited and tried was the same.

"It is urged by the learned counsel for the relator that this is a controlling authority in the case at bar. But we think that there is a material distinction between the facts and circumstances of that case and those disclosed by the record before us. It must be noted in the first place that much stress was laid in that decision, and very properly, upon the fact that by the act of Congress relating to extradition from foreign nations upon the application of the Federal Government, it is expressly provided that the person surrendered shall not, when brought to this country, be tried for any other or different offense. This is the construction given to the act in the case last cited. (*119 U. S., p. 433, U. S. R. S., Sec. 5275.*)

"The Act of Congress passed in pursuance of the Federal Constitution is the supreme law of the land, and this law protected Rauscher from trial for any other offense than the one upon which he was surrendered to this government by the British authorities. Moreover, the laws of Great Britain, from which jurisdiction the fugitive had been extradited, forbid the surrender by that government of persons charged with crime in other jurisdictions, to countries under whose laws the person demanded was liable to be tried for some other or different offense than that charged in the application for extradition. (33 and 34 Vict., Ch. 52; Adriance v. Lagrave, 59 N. Y., 115.) And, therefore, *when the United States took the fugitive from the protection of those laws, its faith and honor was pledged*, at least impliedly, to the effect *that it would not permit its courts to try him for any other offense, even though it might be of a lesser grade than that upon which he was surrendered.* Furthermore, *the offense for which Rauscher was actually tried, was not one which Great Britain had bound itself by the terms of the treaty with this country to surrender him.* It may very well be that *had he been charged in the application for extradition with only the offense for which he was tried, that the government within whose jurisdiction he was found would have refused to surrender him to the authorities of the United States.* It would, therefore, seem to be clear that his trial for another offense was in violation of the faith and honor of the government, as well as of an express law of Congress."

People *ex rel.* Post vs. Cross, 135 N. Y., 540, 541, Oct. 18, '92.

And *in re.* Cooper, 143 U. S., 501, 502, Chief Justice Fuller, said:

"In U. S. *vs.* Rauscher, it appeared that the United States asserted the right under the law of nations to try

persons extradited from Great Britain for offenses other than those for which they were extradited, while Great Britain insisted that no such right existed under the law of nations or was conceded by treaty. The question was, whether under the treaty with Great Britain, a man extradited from England to this country on the charge of murder could be tried here for another offense, and it was held that he could not be. And Mr. Justice Miller, delivering the opinion of the Court quoted from the Head Money Cases, 112 U. S., 580, 598, the following language as determinative of the principle upon which the Court proceeded: 'A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this, the Judicial Courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration, that, 'this constitution, and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' *A treaty, then, is*

*a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.'* "

See also the La Ninfa, 75 Fed. Rep., 518, (C. C. A., June 29th, 1896), and Miller on the U. S. Constitution, pp. 323, 324.

Mr. Justice Jackson, in distinguishing between interstate rendition, which rests entirely upon constitutional provision, and international extradition which is based upon the stipulations of treaty made pursuant to the constitution, said: "*The extradition depends upon treaty contract or stipulation, which rests upon good faith*, and in respect to which the sovereign upon whom the demand is made can exercise discretion, as well as investigate the charge on which the surrender is demanded."

*Lascelles vs. Georgia, 148 U. S., 545.*

"Lascelles claimed immunity from prosecution upon charges other than the one for which extradited, because of the protective provisions (as he viewed them) of the Federal Constitution and statutes. The court simply held against his theory of constitutional and statutory interpretation, and denied his claim of constitutional right. The subject of limitations upon the right of prosecution growing out of the principles of interstate comity, and of good faith and honest dealing with the defendant, was not adverted to, because not involved in the case. Whether, since the decision of Lascelles vs. State, a claim of immunity from additional prosecution can still be rested upon constitutional grounds, certain it is that the general grounds of justice are still open."

*State vs. McNaspy, (Kan.), 50 Pac. Rep., 897. (Nov. 6, '97.)*

Several of the state courts have applied the principles of international extradition to interstate rendition of persons charged with crime.

*In re Cannon, 47 Mich., 486.*
*State vs. Hall, 40 Kan., 345.*
*In re Robinson, 29 Neb., 137, 138.*
*Ex-parte McNight, 48 Ohio St., 588.*

In the Coy case, application for *habeas corpus*, on the ground of illegal detention, relator stated that he was extradited from the republic of Mexico on the charge of the murder of S. L. Elder and Bud Elder, and on no other charge; that in those cases *he had been admitted to bail*, but that he was now held in confinement by the sheriff of Bexar county, Texas, on the charge of the murder of one James Jackson; and that by the provisions of the extradition treaty, he is protected from arrest on any other charge than the one upon which he was extradited. Held, that relator has the right to claim exemption from trial upon any other charge than the charge mentioned in the extradition proceedings.

Regarding the proposition that the relator had waived his immunity from punishment for other offenses not embraced in the extradition proceedings, the court said: "Mr. Coy, while entitled to all the benefits of the law in his favor, is not a very important factor in considering this question. This government has entered into solemn treaty stipulations with Mexico with reference to refugees from justice These stipulations are, by a declaration of the constitution of the United States, the supreme law of the land, state constitutions and laws to the contrary notwithstanding. *These stipulations this government cannot forget, nor can it justify their violation without justly incurring the contempt of the civilized world;* and yet we are seriously told Mr. Coy has waived this binding obliga-

tion on the part of the United States, and has cancelled the right of Mexico to expect the government of the United States to keep its plighted faith. This is not all; the political authorities of the United States have made the declaration to the world contained in section 5275, Rev. St., which reads as follows: [The section here given in full.]

"And again we are gravely told Mr. Coy has released the government from this solemn declaration by a waiver. *Was Mr. Coy a part of the treaty stipulations with Mexico? Is Mr Coy able to bind and unbind the government from its duties and obligations toward other nations by any act that he can perform?* The statement of the proposition discloses its absurdity."

*Ex-parte Coy, 32 Fed. Rep.,911, 917,(Nov. 30th, 1887.)*

"He cannot be held to have forfeited any right before conviction."

*Comption, Ault & Co., vs. Wilder, 40 Ohio St., 133.*

*The immunity of the extradited person arises from his extradition.* The right is international rather than personal. It rests upon contract between two governments. His immunity is within the control of the surrendering government for the preservation of the trust reposed within that government, and for the protection of the accused. The government of the country of his asylum surrenders him to be tried for the extradition crime and no other, "*until a reasonable time and opportunity have been given him, after his release or trial upon such charge,* to return to the country from whose asylum he had been forcibly taken under those proceedings."

(*Rauscher Case, Supra, p. 430.*)

"Time and opportunity" here used, are words of *limitation* and *forbid* his arrest or trial, and render it impossible for him, by any act or omission of his own, to bind the surrendering government or release the immunity from any other offense occurring prior to his extradition, until such "time and opportunity" shall have fully expired "after his release or trial upon such charge"

The facts in the Miller extradition case are substantially these: In the early part of 1881, it is said, three men broke into a farm house not far from Pittsburg, Penn., attacked the inmates and committed a robery. A large amount of booty was carried off, and one of the burglars, Miller by name, described as a notorious and skillful criminal, was captured. He was tried, convicted and sentenced to the Western Penitentiary for eight years. After serving nearly two years he escaped, but was traced to Toronto, and steps were taken to secure his extradition.

Eminent counsel were retained, and they argued a motion before the Canadian courts that Miller should be surrendered to serve out his unexpired term. To this it was replied that the crime of burglary was not covered by the extradition treaty of 1842, between the United States and Great Britain. To meet this difficulty recourse was had to the assault committed by Miller in the course of the burglary. Assault with intent to commit murder was then and is now a crime for which, under the treaty, the surrender of a criminal may be demanded. Miller had never been indicted for this assault, and the charge was merely made for the purpose of getting him back to serve out his term of imprisonment. The Canadian authorities finally surrendered him. He was taken back to the penitentiary and there imprisoned. No proceedings were taken to punish him for the crime for which he was extradited, and after some months the matter was brought up in the Canadian Parliament, and the United States

charged with a violation of good faith in the matter, on the ground that Miller was not punished for the offense for which he was surrendered, but was undergoing punishment for an offense for which he was not extradited.

The questions raised in the correspondence with regard to Winslow are these: Can a fugitive from justice, expressly surrendered on a charge of one crime, be tried for another and totaly different crime? If not, how is such a violation of the treaty to be prevented? Can the courts before which the fugitive is brought release him? And if not, how can there be any redress? Besides this, another question arose as to the effect of what is known as the English Extradition Act of 1870, which provides that a fugitive shall not be surrendered at all by England unless it appears that the country to which he is surrendered has provided by law, or by arrangement, that he shall be tried only for the offense for which he is surrendered.

Great Britain demanded a pledge from the United States that Winslow should be tried upon the charge upon which Great Britain would surrender him and no other charge.

The United States replied that the treaty provisions could not be enlarged by municipal legislation and that the treaty itself together with the way this government had construed it and acted upon it in all the years since the treaty came into existence, was a sufficient pledge. Winslow was not surrendered. See "Extradition," 136 N. A. Rev., 498, 499, (May, 1883), by A. E. Sedgwick, as to the Winslow and Miller cases. 25 Cent. L. J., 267, Sept. 23rd, '87.

The surrendering nation has the right to demand that the treaty stipulations shall control and protect the immunities of the party surrendered. "*When this right is finally abandoned, the end of all extradition treaties can be confidently predicted. The United States, above all*

*other nations, perhaps, certainly above all but England, is interested to maintain the right of asylum inviolate.*" Judge Lowell, on the Winslow case, 10 Am. Law Rev., 625, (July, 1876).

Hon. William Beach Lawrence, in his letter of March 28, 1879, (19 Albany Law Journal, 330), speaking of the work and report of the Royal Commission on Extradition, created in 1877, to consider the laws and treaties relative to extradition, says, the commission declare, "'the real political remedy seems to be that the accused should have a right to demand an inquiry, on which inquiry there should be no restriction on the kind of evidence to be received, except that imposed by common sense, and if the result of the inquiry should be that in the opinion of the government a proper case has been made out, discretion should be given the government in favor of the accused, either to refuse to deliver him up at all, or to *require before delivering him up a specific engagement from the foreign government that, if acquitted of the crime for which he is demanded, or when he has suffered the punishment of that crime, he shall be at liberty to quit the country to which he has been surrendered.* Such an engagement would probably seldom be refused. It may safely be assumed that no foreign government would be so lost to a sense of its own honor and interest as to violate a pledge so given. If it were, *the order in council enabling a surrender to that foreign government should at once be revoked.*'"

As indicative of the sentiment leading to the extradition treaty of 1889, reference is here made to the "Weldon bill," which passed the Canadian Parliament and was assented to May 2, 1889, but which was not to become operative until proclaimed by the Governor General. This act in its schedule contains "larceny" as an extraditable offense, but does not include the offense found in the capias

of the District Court in the case at bar. The fifth section of the act is as follows: "This act shall not authorize the issue of a warrant for the extradition of any person under the provisions of this statute, to any state or country in which by the law in force in such state or country, such person may be tried after such extradition for any other offense than that for which he has been extradited, unless an assurance shall first have been given by the executive authority of such state or country, that the person whose extradition has been claimed, shall not be tried for any other offense than that on account of which such extradition has been claimed."

*23 Am. Law Rev., 811.*

The leading complaints made against the treaty of 1842 were, that it contained too few offenses for which extradition could be had; that it did not in express terms require that the offense for which the surrender should be made be expressed in the surrendering warrant, and that the accused should be tried on the charge of that offense and no other, until he shall have had an opportunity of returning to the country of his asylum, and that the treaty did not expressly prohibit extradition for political offenses.

Section two of the tenth article of the supplemental treaty of 1889 expressly forbids the surrender, trial or punishment of any person for any political crime or offense. In part it says. "No person surrendered by either of the high contracting parties to the other shall be *triable or tried, or be punished for any political crime or offense, or for any act connected therewith, committed previously to his extradition.*" (26 U. S. Stat. at L., 1509). Yet in the face of this very clear prohibition, if the contention of the appellee and the decision of the District Court were the proper construction of this treaty, the accused being

on bail a short time in the extradition case, takes him beyond the pale of the treaty immunity, and renders him triable and punishable on the charge of any other offense occurring prior to his extradition. The civilized nations of the earth carefully guard against surrender of persons accused of political offenses. Such immunity is now embodied in the British treaty as it is in the Mexican treaty. But when the accused is once within the country to which he has been surrendered on an extraditable charge, *his immunity from trial and punishment for political offenses rests upon the treaty and nothing else.* As was said with a tinge of irony in Blandford *v.* State, *supra*, a case arising under the Mexican treaty, "make a *prima facie* case of murder, extradite, and then try him for rebellion?" and in Com. *v.* Hawes, *supra*, p. 705, make a *prima facie* case of forgery, extradite, and then compel the accused to go to trial on the indictment for offenses not extraditable. And we may say of the case at bar, make a *prima facie* case of larceny against Cosgrove, extradite him to the State Court, and then refuse to place him on trial but *hold him on bail for appearance and trial on that charge;* and while that case is pending, on complaint of the *same person* (the appellee), arrest and hold him on a *capias* charging him with a non-extraditable offense and place him on trial on the indictment in the Federal Court on charges of offenses other than the extradition offense, and which are alleged to have occurred prior to his extradition.

In *ex parte* Coy, *supra*, the Court ridiculed the contention of the State that the accused, surrendered to this government under the treaty with Mexico, while entitled to all the immunities afforded him by that treaty, had it within his power to *release this government from any of its solemn treaty obligations* toward the surrendering nation. And Compton *v.* Wilder, *supra*, is authority that

he cannot be held to have forfeited any right before conviction.

The correspondence in the Winslow case shows the *uneasiness* of Great Britain in 1876, regarding the treatment which our government would accord the accused, surrendered under the treaty of 1842. And the Miller case, six years later, *afforded that government an opportunity to charge our own government with bad faith and an evasion of that treaty*, on authority of courts and law writers of our own country.

We have, as the result of all this anxiety and agitation, the present treaty. Cosgrove was extradited under this treaty. It expressly states that he shall not be tried on any other charge than that upon which he was surrendered under the extradition proceedings. The Rauscher decision in 1886, based upon the treaty of 1842, and the acts of congress passed to carry that and other similar treaties into effect, and the treaty as supplemented in 1889, affirming the majority opinion and meeting the requirement of the dissenting opinion in that case, have firmly established the rule that the party extradited to this country from Great Britain under this treaty, *can be tried for but one of the offenses named in the treaty, and that is the one named in the warrant upon which he was surrendered to this government, and cannot be arrested, triable or tried for any offense committed prior to his extradition other than that upon which he was surrendered, until he shall have had an opportunity of returning to the country from which he was surrendered.*

Assignments one and two involve a discussion of bail. The District Court held that appellant being on bail for appearance in the State Court in the extradition cause, was such a free agent as to deprive him of treaty protection against the arrest on the capias in the District Court.

It is not material in this appeal whether Cosgrove

went back to Canada or not during the time he was on bail pending his trial in the State Court, from June to December. If he was liable to arrest at all on the capias in that time, he would be liable if he had remained at large on bail in Michigan continuously during that entire period. The treaty gave him immunity from arrest, "until he shall have had an opportunity of returning to the country from which he was surrendered." If the time for such opportunity began to run at once upon his enlargement on bail in June, sufficient time had elapsed by December 14th, the date of his arrest on the capias. (Rec., p. 5). It appears from appellant's petition that he was urging his trial in the Recorder's Court, and that he had often requested that court to place him on trial on the larceny charge. (Rec., p. 2). He was within the state in the custody of his sureties awaiting and urging his trial in the State Court, to which he had been extradited, when arrested on the capias from the District Court. The marshal's return to the writ of *habeas corpus* admits that *defendant was on bail for appearance in the Recorder's Court on the charge of larceny.* (Rec., p. 6.) He was orderly and could at any time surrender himself for trial in the Recorder's Court, or his sureties could surrender him, at any time prior to his arrest on the capias. If appellee's contention is right and the decision of the District Court on this point in the controversy is the law governing the case, an extradited person admitted to bail thereby loses his treaty protection against arrest on charges other than the charge upon which he was surrendered on the extradition warrant and occurring prior to his extradition.

But offenses of the class for which Cosgrove was extradited to the State Court are *bailable.* He was entitled to bail on the authority of both the Federal and the State constitutions. Each constitution says, "Excessive bail shall not be required," U. S. Const., 8th amendment;

Const. of Mich., Art. 6, Sec. 31. "*All persons shall*, before conviction, *be bailable* by sufficient sureties, except for murder and treason, when the proof is evident, or the presumption great." Const. of Mich., Art. 6, Sec. 29. The constitutional privileges were open to Cosgrove, surrendered to the State Court on the charge of larceny. He furnished the necessary bail. His sureties were not complaining in their exercise of custody over him when he was arrested on the District Court capias, December 14, 1896. (See Opinion, Rec., p. 9). It was not necessary that he remain within the four walls of the prison. On bail he was equally in custody. He was in the custody of his sureties, who may be considered as holding him by a rope upon which they could pull at any time and bring him into the Recorder's Court for trial, if he should not voluntarily appear for trial on the extradition charge. His sureties could pick him up at will at any time and in any place and cause him to be incarcerated to insure his appearance for trial on the charge of larceny, in that court. If he was in Canada it was at the risk of his sureties, a matter which in no wise affects the district court, and which can in no wise enure to its advantage in its attempt to try appellant before he has been tried on or released from the charge upon which he was extradited and surrendered to the state court. And whether in jail, or, under his constitutional right, in the custody of jailors of his own choosing, (his sureties,) he was constantly in custody awaiting that trial, and could not be and was not at any time after he was surrendered on the extradition warrant, his own free agent. The law considers the principal as a prisoner, whose jail liberties are enlarged or circumscribed at the will of his bail.

*Nicolls vs. Ingersoll, 7 Johns.*, (*N. Y.*), *155.*

On this subject of bail we refer to the following authorities:

*Taylor vs. Taintor*, *16 Wall.*, *371*, *372*, *373*.
*Reese vs. U. S.*, *9 Wall*, *21*.
*Frank Cannon's Case*, *47 Mich.*, *484*.
*Ruggles vs. Corey*, *3 Conn.*, *421*.
*Anon*, *6 Mod.*, *231*.
*State vs. Stevens*. *16 Fed. Rep.*, *105*.
*In re James*, *18 Fed. Rep.*, *856*, *857*.
*U. S. vs. Van Fossen*, *1 Dillon*, *410*.
*Commonwealth vs. Brickett*, *8 Pick.*, *141*.
*Nicolls vs. Ingersoll*, *Supra*.
*Parker vs. Bidwell*, *3 Conn.*, *85*, *86*.

In *Nicolls vs. Ingersoll*, *7 Johns.* (*N. Y.*), *154*, *155*, Thompson, J., said: "A recurrence to a few cases in the books, showing the relation in which the law considers the bail as standing towards his principal, will render it obvious that the power with which he is clothed is not one restricted in its exercise to any particular place. Sir William Blackstone (3 Com., 290) says: The security given for the appearance of a party arrested, is called *bail*, because the defendant is delivered to the surety, and is supposed to continue in his friendly custody, instead of going to jail. Bail, in the language of the books, are said (6 Mod., 231) to have their principal always upon a string, which they may pull whenever they please, and surrender him in their own discharge. They may take him up, even upon a *Sunday*, and confine him until the next day, and then surrender him. The doing so on *Sunday* is no service of process, but rather like the case where the sheriff arrests a party who escapes, for that is only a continuance of the former imprisonment.

"Lord Hardwick says: (1 Atk., 237, *Ex parte* Gibbons.)

It is the constant language of courts that bail are their principals' *jailors*, and that it is upon this notion that they have an authority to take them; and that, as the principal is at liberty only by the permission and indulgence of the bail, they may take him up at any time. The same principle is recognized in *Shower* (*Anonymous case*, 214) where it is said by the court, that bail are but jailors, *pro tempore;* and in case a man absconds, and his bail cannot find him, they shall have a warrant to take him out of any pretended place of privilege, in order to surrender him, *because he is a prisoner to the court, and they may call him at pleasure.* If the principal is to be considered as standing in the situation of a prisoner who has escaped from the arrest of the sheriff, according to the language of one of the cases, can there be any reasonable doubt but a sheriff, in such case, would have a right to pursue and arrest his prisoner in a neighboring state; and, by parity of reasoning, bail must have the like authority. The cases I have referred to are sufficient to show that *the law considers the principal as a prisoner, whose jail liberties are enlarged or circumscribed at the will of his bail;* and, according to this view of the subject, it would seem necessarily to follow, that, as between the bail and his principal, the controlling power of the former over the latter may be exercised at all times and in all places; and this appears to me indispensable for the safety and security of bail."

It was said by this court per Mr. Justice Swayne: "When bail is given, the principal is regarded as delivered to the custody of his sureties. *Their dominion is a continuance of the original imprisonment.* Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may

exercise their rights in person or by agent. They may pursue him into another State; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner. In 6 Modern it is said: 'The bail have their principal on a string, and may pull the string whenever they please, and render him in their discharge.' The rights of the bail in civil and criminal cases are the same. *They may, doubtless, permit him to go beyond the limits of the State within which he is to answer*, but it is unwise and imprudent to do so; and if any evil ensue, *they must bear the burden of the consequences*, and cannot cast them upon the obligee.

"In the case of *Devine vs. The State*, the court, speaking of the principal, say, 'The sureties had the control of his person; they were bound at their peril to keep him within their jurisdiction, and to have his person ready to surrender when demanded.'"

*Taylor vs. Taintor, 16 Wallace, 371, 372.*

Though beyond the State, the principal "was still, through his bail, in the hands of the law of that State, and held to answer there for the offense with which he was charged." *Id., 373.*

In an early case, Hosmer, Ch. J., said: "On principles of common law, the bail may take his principal when and where he pleases; and this is considered not as a new arrest, but as a continuance of the former imprisonment. 'He has the principal always on a string, and though extended to the remotest corner of the earth, he may pull it when he pleases.' In legal contemplation, the principal is in the custody of the bail, who is viewed as his jailor *pro*

*tempore*, and the latter may always take the former, and actually confine him."

*Ruggles vs. Corey, 8 Conn., 421, citing cases.*

Judge Campbell said:

"It was claimed on the argument that when arrested for bastardy, Cannon was not under legal restraint, but at large, and therefore, that he was no longer under the operation of the extradition proceedings. *This position is not true.* He was bound to appear before the justice on the 27th of December, and would forfeit his bail if he did not. His bail were in law entitled to his custody, and could at any time have handed him over to the authorities. *The legal duress in such a case is not ended until the prisoner is discharged.*"

*Frank Cannon's Case, 47 Mich., 484.*

And this court, per Mr. Justice Field, said:

"By the recognizance the principal is, in the theory of the law, committed to the custody of the sureties as to jailors of his own choosing, not that he is, in point of fact, in this country at least, subjected, or can be subjected by them to constant imprisonment; but *he is so far placed in their power that they may at any time arrest him upon the recognizance and surrender him to the court*, and, to the extent necessary to accomplish this, may restrain him of his liberty."

*Reese vs. U. S., 9 Wall., 21.*

Attention is again called to page 424 of the Rauscher case, where the court say: "That right, as we understand it, is, that he shall be tried only for the offense with which he is charged in the extradition proceedings, and for which he was delivered up, and that *if not tried*

*for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime* committed previous to his extradition." This, as we understand it, means a release and departure, or reasonable opportunity for departure after the termination of the extradition case.

The dissenting opinion of Mr. Chief Justice Waite, in the Rauscher case, *supra*, page 434, says: "I concede that the treaty is as much a part of the law of the United States as is a statute; and if there is anything in which it forbids a trial for any other offense than that for which the extradition was made, the accused may use it as a defense to a prosecution on any other charge until a *reasonable time has elapsed after his release from custody on account of the crime for which he was sent back.*" A release from custody cannot mean a release on bail.

Mr. Justice Miller, in the Rauscher case, *supra*, pages 426, 427, in distinguishing the case of *Adriance vs. LaGrave*, 59 N. Y., 110, stated that, "LaGrave was held for trial in this country under extradition proceedings, by which he was removed from France under the treaty of 1843 with that nation, *being out on bail*, he was arrested under a writ in a civil suit for debt, which issusd from one of the courts of the State of New York. He made application by a writ of *habeas corpus* to be released from this arrest, on the ground that he was protected from it by the terms of the treaty under which he was surrendered, which, in that respect, was similar to those of the treaty of 1842, with Great Britian."

And the Federal Supreme Court there say that while it is not necesssary to decide whether he could be so served with process in civil proceedings, it does not follow that he would be equally liable to arrest, trial and conviction for a *crime not enumerated in the extraditon treaty*, and committed before his removal. And it is also there stated

that the Supreme Court of New York *unanimously* and by three eminent judges, ordered LaGrave's discharge from the arrest under the civil writ, while the Court of Appeals reversed that order by a *divided* court. But nowhere in the consideration of the case did the Federal Supreme Courts make any reference to the fact that *LaGrave was on bail when arrested on the writ in the civil case* as rendering his condition or liability to that arrest any different from what it would have been were he in jail at the time it was served.

And further on in the Rauscher case, supra, at page 423, Mr. Justice Gray concurring in the majority opinion, says: that he *concurs on the single ground* that, by Revised Statutes, Section 5275, "providing measures by which any person delivered up by a foreign government for the purpose of being tried here for a crime of which he has been accused, may be secured against lawless violence '*until the final conclusion of his trial* for the crimes or offenses specified in the warrant of extradition, *and until his final discharge from custody or imprisonment* for or on account of such crimes or offenses, *and for a reasonable time thereafter*,' the political deparment of government has clearly manifiested its will, in the form of an express law, (of which any person prosecuted in any court within the United States has the right to claim the protection,) and the accused shall be tried only for the crime specified in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States before he can be arrested or detained for another offense." This immunity from arrest continues during the entire period of the pendency of the extradition cause and for a reasonable time after the final termination of that cause.

And Mr. Justice Miller, who wrote the opinion of the court in the Rauscher case, in his work on the United States Constitution, page 323, says of that case, the

Supreme Court held that, "the treaty would, in the event that he was either *acquitted or not tried* for the offense for which he had been extradited, give him a right to be *set at liberty and allow him a reasonable time to return* to Great Britain." Here the learned jurist and writer uses the language "acquitted or not tried," as the time and event giving the extradited person the right to be set at liberty and allowing him a reasonable time *thereafter* to return to Great Britain.

In *ex parte* Coy, supra, the *accused was on bail and had long been on bail on the charge upon which he was extradited*, when arrested upon the charge of another offense not embraced in the extradition proceedings; and the court refused the contention of the state that the accused had waived his treaty immunity from such arrest and punishment, and held that *the treaty protected the accused from such arrest and punishment during the life of the extradition case.*

"The language of the section [5275] includes not merely 'security against lawless violence' but, in addition thereto, *'the safekeeping and protection' of the accused until his acquittal, or if convicted. until he has served out his sentence, and for a reasonable time thereafter.* Reasonable time for what? 'Obviously,' says the Supreme Court, 'until he shall have had a reasonable time to return unmolested to the country from which he was brought.' Mr. Justice Gray concurred in the judgment of the court solely upon that construction of the statute." *In re* Reinitz, 39 Fed. Rep., 207, (June 24, 1889). This is the rule adopted by a Federal Circuit Court since the decision in the case of Rauscher.

On page 208 of the Reinitz case, the court said: "If the opportunity to return is a *'right conferred' upon the prisoner* as well as a *duty owed to the extraditing government*, it is manifest that both the right and the duty are

infringed by a civil arrest as much as by a criminal one. The good faith of third persons who prosecute the prisoner becomes immaterial. See Lowell, J., on Winslow Case, 10 Am. Law Rev., 620."

"Finally, the language used by the various publicists and text writers, referred to with approval by the Supreme Court in the *Rauscher case*, forbids an arrest in one form of proceeding as much as in the other. Mr. William Beach Lawrence says that the prisoner is entitled, unless found guilty of the offense for which he is extradited, to be *restored in safety to the country of his asylum at the time of his extradition. Judge Cooley declares that 'the prisoner has a right to have the particular offense disposed of, and then to depart in peace.'* And Mr. Spear considers it 'the duty of courts to secure to him, as against all attempts at legal interference therewith, *a reasonable opportunity to exercise this right.*' Spear Extr., (2d ed.) 131-145, 557." In re Reinitz, 39 Fed. Rep., 208, 209.

In the case at bar, the Circuit Court of Appeals, "after the case had been fully argued on its merits," informed the District Court "that there was *grave reason to doubt* the correctness of [its] *conclusion* in the case."

*C. C. A., letter, supra.*

From a review of the authorities, it seems clear that the immunity from arrest given Cosgrove on his surrender to the State Court by the Canadian government extends for a reasonable length of time after the final disposition of that case. This seems the rational construction of the treaty and laws governing his surrender. We may well say of this treaty as was said by the Michigan Supreme Court in the oleomargarine cases just decided, "It will be an unfortunate day for constitutional rights, when courts begin the insidious process of undermining constitutions by holding unambiguous provisions and limitations to be

directory merely, to be disregarded at pleasure." (People vs. Dettenthaler, 5 Detroit Legal News, 677, Dec. 6, 1898.)

It would seem to follow that the 5th and 6th assignments of error are well taken. The treaty of 1889, the acts of Congress pertaining to that and other similar treaties, the Federal Supreme Court decisions relating thereto, notably in the Rauscher case, the laws of the surrendering country, the requisition and the surrendering warrant, mean that Cosgrove, extradited to this country from Canada under that treaty, is entitled to protection against molestation and exempt from arrest and trial on any and every charge of offense occurring prior to his extradition until the final termination of the charge upon which he was surrendered, and for a reasonable time thereafter. It matters not how he employs the period intervening that trial. He would constantly be in legal custody and would not be subject to such arrest.

It seems to us that the learned District Judge touched upon the real motive that prompted the prosecution in this case. The marshal set the State Court machinery in motion to bring the defendant within the U. S. District Court jurisdiction on the charge of larceny. The penalty for this offense does not exceed 5 years' imprisonment or $500 fine. Howell's Annotated Statutes, (Mich.,) Sec. 9140,—"Every person who shall commit the offense of larceny * * * if the property stolen exceed the value of twenty-five dollars, shall be punished by imprisonment in the state prison not more than five years, or by fine not exceeding five hundred dollars."

Immediately thereafter, the marshal and other United States authorities had Cosgrove indicted on the charges of resisting an officer in the service of a writ of attachment, and of unlawfully removing a vessel from the possession of the marshal, where the penalty is as high as ten years imprisonment and $10,000 fine. (U. S. Rev. Stat., Secs.

5383, 5398.) And then before he could be tried in the State Court on the extradition charge of larceny, he was arrested and held for a non-extraditable offense on the *capias* issued on the indictment, and constantly held thereon in the District Court, rendering it impossible for the Recorder's Court to produce him and try him on the charge on which he had been arraigned and held for trial in that court.

If the respondent's contention were the true construction of the meaning of the treaty, just admit the accused to bail to appear for and stand trial on the charge for which he was extradited, and after a few days, he would be subject to arrest, and would be triable for as many offenses (including political offenses) other than the extradition offense charged to have occurred prior to his extradition, as can be sought out against him, and all before his trial on the charge upon which he was surrendered. And likewise under appellee's contention admit appellant to bail, have him return to Canada, the country of his asylum, awaiting his trial in the extradition cause, and at once upon his reappearance in this country for that trial, he may be arrested and tried for as many offenses other than the extradition offense occuring prior to his extradition, as suits the will of the prosecuting authorities and regardless of the fact that the extradition cause is undisposed of and still pending. Such a construction of the treaty and laws governing Cosgrove's surrender, leads to the conclusion that his only safety and treaty protection lay in his constantly remaining in jail from the time of his surrender to the state authorities to his trial in the Recorder's Court, thus depriving him of his constitutional right of bail.

But the treaty makes no such distinction. It is a forced and unwarranted construction of the treaty and the laws governing Cosgrove's surrender. That a person con-

stantly held in custody to respond for trial at a few hours notice, and obliged to appear and respond to keep faith with his obligation, whether within the United States or elsewhere, is so released, or such a free agent as to take him beyond the treaty protection and subject him to arrest and trial on charges other than the one upon which he was extradited and for offenses alleged to have occurred prior to his extradition, and such arrests while the extradition case is pending against him, and in the face of his constant efforts to have the extradition case disposed of, is a construction of the object and purpose and meaning of the treaty unwarranted in law, and which is unworthy of this government, and unfair and unjust to both the petitioner and the Canadian government. The treaty recognizes no difference between the *custody of bail* and the *custody of the prison walls.* His immunity from arrest on charges other than the extradition charge, occurring prior to his extradition, extends to the final determination of the case upon the extradition charge. And this is true in Cosgrove's case.

Accordingly, we contend that the District Court erred in denying the prayer of appellant's petition for *habeas corpus* that he be relieved from the detention and imprisonment of the District Court, and in remanding him to the custody of the marshal and holding him for trial in that court. And it is here asked that this judgment of the District Court be reversed, and a judgment entered relieving appellant from said detention and imprisonment.

E. H. SELLERS,
Att'y for Appellant.

CASSIUS HOLLENBECK,
Of Counsel.